

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CASEY J. O'CONNELL, and BECKY A.
O'CONNELL,

Plaintiffs,

v.

JP MORGAN CHASE BANK, N.A.; LA
SALLE BANK, N.A.; WASHINGTON
MUTUAL BANK, F.A.; CALIFORNIA
RECONVEYANCE COMPANY; DOE
INDIVIDUALS I-X; ROE COMPANIES I-X,

Defendants.

3:11-cv-00685-RCJ-WGC

ORDER

Currently before the Court is Plaintiffs Casey and Becky O'Connells' Motion to Remand (#7). The Court heard oral argument on March 19, 2012.

BACKGROUND

On March 26, 2007, Plaintiffs Casey and Becky O'Connell ("Plaintiffs") executed a "Note" payable to Defendant Washington Mutual Bank, F.A. ("Washington Mutual"), which was secured by a deed of trust for property located at 12385 Ocean View Drive, Sparks, Nevada 89436 ("the Property"). (Am. Compl. (#1) at ¶¶ 10-11). Defendant California Reconveyance Company ("CRC") was listed as the trustee. (*Id.*) Defendant JP Morgan Chase Bank, N.A. ("JP Morgan") is the successor-in-interest to Washington Mutual. (*Id.* at ¶ 13).

On December 3, 2008, JP Morgan executed an "Assignment of the Deed of Trust," naming Defendant LaSalle Bank, N.A. ("LaSalle") as the beneficiary of the deed of trust. (*Id.*) On the same date, CRC filed a "Notice of Default" with the Washoe County Recorder.

1 (*Id.* at ¶ 15). Subsequently, CRC filed three "Notices of Trustee's Sale" with the Washoe
2 County Recorder on March 6, 2009, March 30, 2009, and June 10, 2011. (*Id.* at ¶¶ 18-20).

3 Plaintiffs filed an Amended Complaint in Nevada state court against Defendants,
4 alleging unlawful or fraudulent foreclosure, and seeking declaratory and injunctive relief
5 preventing the Trustee's sale from going forward on September 13, 2011. (Am. Compl.
6 (#1) at ¶¶ 28-47). CRC removed the case to federal court on September 22, 2011. (Pet.
7 for Removal (#1)). On October 25, 2011, Plaintiffs moved to remand the case to state
8 court. (Mot. to Remand (#7)). CRC filed its opposition to the motion to remand on
9 November 14, 2011. (Opp'n (#9)). Plaintiffs filed their reply on December 5, 2011. (Reply
10 (#10)).

11 LEGAL STANDARD

12 Removal may be challenged by a motion to remand. 28 U.S.C. § 1447(c); *Arco*
13 *Env'tl. Remediation, LLC v. Dep't of Health and Env'tl. Quality*, 213 F.3d 1108, 1113 (9th
14 Cir. 2000). A defendant may remove any case that could originally have been brought in
15 federal court. 28 U.S.C. § 1441(a). The removing party has the burden to prove removal
16 was proper by a preponderance of the evidence. *Geographic Expeditions, Inc. v. Estate If*
17 *Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010). The removal statutes are strictly
18 construed and any doubts concerning the right of removal must be resolved in favor of
19 remand. *Gaus v. Miles, Inc.*, 980 f.2d 564, 566 (9th Cir. 1992). Remand is warranted
20 where the court lacks subject matter jurisdiction or there is a defect in th removal
21 procedure. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1266 (9th Cir. 1999),
22 *superseded by statute on other grounds as stated in Abrego Abrego v. Dow Chem. Co.*,
23 443 F. 2d 676 (9th Cir. 2006).

24 Federal courts have subject matter jurisdiction over all claims that "arise under" the
25 Constitution and laws of the United States, and all claims between citizens of different
26 states in which the amount in controversy exceeds \$75,000. 28 U.S.C. § 1331; 28 U.S.C.
27 § 1332(a). Generally, the "well-pleaded" complaint must present a federal question on its
28 face to provide subject matter jurisdiction under 28 U.S.C. § 1331. *Rivet v. Regions Bank*,

1 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L.Ed.2d 912 (1998). A federal defense to a
 2 state law claim does not provide subject matter jurisdiction. *Id.*

3 Finally, the “unanimity rule” requires that all properly served or joined defendants
 4 join or consent in the removal petition. 28 U.S.C. § 1446(b)(2)(A); *see also Destifino v.*
 5 *Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011). The removing party has the burden to explain
 6 the absence of co-defendants who have not joined or consented to the removal petition.
 7 *Prize Frize, Inc.*, 167 F.3d at 1266.

8 DISCUSSION

9 I. Diversity Jurisdiction

10 A. Complete Diversity

11 Plaintiffs argue that remand is warranted because this Court lacks diversity
 12 jurisdiction since both Plaintiffs and Ticor Title of Nevada, Inc. (“Ticor Title”) are citizens of
 13 Nevada. (Mot. to Remand (#7) at 4). Title 28 U.S.C. § 1332(a) requires “complete
 14 diversity,” such that no defendant is a citizen of the same state as any plaintiff. *Owen*
 15 *Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L.Ed.2d 274
 16 (1978).

17 The fact that Ticor Title is a Nevada resident does not defeat complete diversity
 18 because it was not named as a defendant in this action. *See* (Am. Compl. (#1)). Although
 19 Ticor Title may be included in the “Roe” companies that Plaintiffs allege claims against,
 20 Plaintiffs have not amended their complaint to formally add Ticor Title as a defendant, *see*
 21 (*id.*), and “the citizenship of defendants sued under fictitious names” is disregarded when
 22 determining whether a civil action is removable on the basis of diversity jurisdiction. 28
 23 U.S.C. § 1441(b)(1). The four corporate defendants named in the complaint, JP Morgan,
 24 LaSalle, Washington Mutual, and CRC, are citizens of Ohio, Illinois, Washington, and
 25 California, respectively. *See* (Pet. For Removal (#1) at ¶ 11). Therefore, there is complete
 26 diversity between the parties.

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1 **B. Amount in Controversy**

2 Plaintiffs next argue that this Court lacks diversity jurisdiction because the amount in
3 controversy is less than \$75,000. (Mot. to Remand (#7) at 6). As the removing party, CRC
4 must prove by a preponderance of the evidence that the amount in controversy is met.
5 *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). "In actions
6 seeking declaratory or injunctive relief, it is well established that the amount in controversy
7 is measured by the value of the object of the litigation." *Hunt v. Wash. Apple Adver.*
8 *Comm'n*, 432 U.S. 333, 347, 97 S. Ct. 2434, 2443, 53 L.Ed.2d 383 (1977).

9 Plaintiffs argue that the amount in controversy is less than \$75,000 because they
10 seek to prevent a wrongful foreclosure and not to quiet title in the property. (Mot. to
11 Remand (#7) at 6). Regardless of Plaintiffs' intentions, the Property is the object of this
12 litigation because Plaintiffs seek to keep the Property by asking for declaratory and
13 injunctive relief preventing the defendants from foreclosing. See (Am. Compl. (#1) at ¶¶
14 36, 40). A court may look to either the value of the indebtedness or the fair market value of
15 the property to determine the amount in controversy in foreclosure claims. *Ngoc Nguyen v.*
16 *Wells Fargo Bank, N.A.*, 749 F. Supp. 2d 1022, 1028-29 (N.D. Cal. 2010). Under either
17 approach, the amount in controversy is met. CRC presented evidenced that the fair
18 market value of the Property is \$714,492.00, (Opp'n (#9) at Ex. A at 5), and the amount of
19 the loan is \$572,393.00. (*Id.* at Ex. B at 4). Therefore, the amount in controversy exceeds
20 \$75,000. Accordingly, this Court denies the motion to remand.

21 **II. Federal Question Jurisdiction**

22 Plaintiffs argue that remand is warranted because there is no federal question in the
23 complaint supporting the exercise of federal question jurisdiction under 28 U.S.C. § 1331.
24 (Mot.to Remand (#7) at 2-4). "To determine whether the claim arises under federal law, we
25 examine the 'well-pleaded' allegations of the complaint and ignore potential defenses. . . ."
26 *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 2062, 156 L.Ed.2d 1
27 (2003). A claim arises under federal law if the right to relief "requires resolution of a
28 substantial question of federal law" *Franchise Tax Bd. v. Constr. Laborers Vacation*

1 *Trust*, 463 U.S. 1, 13, 103 S. Ct. 2841, 2848, 77 L.Ed.2d 420 (1983). A state-law claim
 2 may also "arise under" federal law when it has been completely pre-empted by a federal
 3 law. *Beneficial Nat'l Bank*, 539 U.S. at 8, 123 S. Ct. At 2063.

4 Plaintiffs are correct that there is no federal question in the complaint. Plaintiffs'
 5 general references to "DUE PROCESS" and violations of rights concern Article 1, Section 1
 6 of the Nevada Constitution, see (Am. Compl. (#1) at ¶¶ 26, 42), and not the Fifth and/or
 7 Fourteenth Amendments of the United States Constitution or 42 U.S.C. § 1983, as CRC
 8 claims. (Opp'n (#9) at 4-5). Furthermore, Plaintiffs never directly reference 42 U.S.C. §
 9 1983, nor allege any wrongdoing by a state or government actor. See (Am. Compl. (#1)).
 10 Therefore, there is no federal question on the face of Plaintiffs' complaint.

11 Neither do Plaintiffs' claims require interpretation of a "substantial federal question."
 12 The material issue in Plaintiffs' unlawful foreclosure claim under Nevada law is "whether
 13 the trustor was in default when the power of sale was exercised." *Collins v. Union Fed.*
 14 *Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983). This issue requires determining
 15 whether Plaintiffs owed a duty to the foreclosing defendants. *Id.* Whether Plaintiffs owed a
 16 duty depends on whether the foreclosing defendants complied with the procedural
 17 requirements set forth in Nevada's foreclosure statutes. See NRS § 107.070 *et seq.*
 18 Furthermore, whether Plaintiffs are entitled to declaratory and injunctive relief depends on
 19 Plaintiffs' likelihood of success on the merits of their unlawful foreclosure claim. None of
 20 this requires interpretation of a "substantial federal question" because it does not implicate
 21 federal law.

22 Finally, Plaintiffs' unlawful foreclosure claim is not completely pre-empted by federal
 23 law. The federal mortgage statutes and National Bank Act do not completely pre-empt
 24 state mortgage and foreclosure actions. See 12 U.S.C. §§ 3751-3768; *Viets v. Wachovia*
 25 *Mortg., FSB*, No. 2:11-cv-00169-GMN-RJJ, 2011 WL 6181934, at *4 (D. Nev. Dec. 12,
 26 2011) (holding that the National Bank Act only pre-empts foreclosure claims that impose
 27 new requirements on the lender). Therefore, pre-emption is, at most, a defense available
 28 to the defendants and does not confer subject matter jurisdiction supporting removal to

1 federal court. See *Rivet*, 522 U.S. at 475, 118 S. Ct. At 925. Although there is no federal
 2 subject matter jurisdiction, this Court denies the motion to remand because this Court has
 3 diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a).

4 **III. Procedural Defects**

5 Plaintiffs argue that remand is warranted because the case was improperly removed
 6 since all of the defendants did not consent or join in the removal. (Mot. to Remand (#7) at
 7 5). The "unanimity rule" requires that all defendants must either consent or join in the
 8 petition for removal. 28 U.S.C. § 1446(b)(2)(A); *Knutson v. Allis-Chalmers Corp.*, 358 F.
 9 Supp. 2d 983, 990 (D. Nev. 2005). The removing party has the burden to affirmatively
 10 explain the absence of any defendants who did not join or consent in the petition for
 11 removal. *Prize Frize, Inc.*, 167 F.3d at 1266. However, the unanimity rule only applies "to
 12 defendants properly joined and served in the action." *Emrich v. Touche Ross & Co.*, 846
 13 F.2d 1190, 1193 n.1 (9th Cir. 1988).

14 CRC has affirmatively explained that its failure to join the other defendants was
 15 because none of the other defendants were properly served prior to CRC's petition for
 16 removal. (Opp'n (#9) at 7, n.2-3). Plaintiffs have not presented any evidence that the
 17 other defendants were properly served. See (Mot. to Remand (#7)); (Reply (#10)).
 18 Therefore, the removal was not procedurally defective. Accordingly, this Court denies the
 19 motion to remand.

20 **IV. Abstention**

21 Finally, Plaintiffs argue that even if this Court has subject matter jurisdiction, it
 22 should abstain under *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85
 23 L.Ed.2d 971 (1941), because unlawful foreclosure is a novel issue of Nevada state law
 24 given the recently enacted Assembly Bill 284. (Mot. to Remand (#7) at 7-8); (Reply (#10)
 25 at 3-7). Assembly Bill 284 increases civil liability for mortgagors and trustees who fail to
 26 comply with the statutory requirements for recording assignments of deeds of trusts. A.B.
 27 234, 76th Reg. Sess. (Nev. 2011). The amendments are not retroactive and only apply to
 28 assignments recorded on or after July 1, 2011. *Id.*

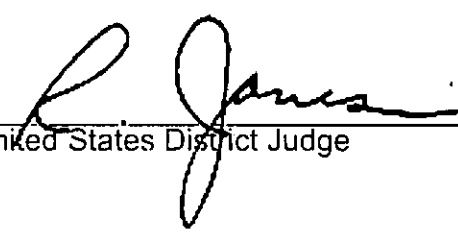
1 *Pullman* "[a]bstention is appropriate in cases presenting a federal constitutional
2 issue which might be mooted or presented in a different posture by a state court
3 determination of pertinent state law." *Colo. River Water Conservation Dist. v. United*
4 *States*, 424 U.S. 800, 814, 96 S. Ct. 1236, 1244, 47 L.Ed.2d 483 (1976) (quotations
5 omitted). Generally, abstention is required if: (1) the federal court can avoid analyzing a
6 "sensitive area" of state social policy; (2) the federal constitutional question will be mooted
7 if the state court issues a determinative finding on the state law issue; and (3) "the possibly
8 determinative issue of state law is doubtful." *Knudsen Corp. v. Nev. State Dairy Comm'n*,
9 676 F.2d 374, 377 (9th Cir. 1982).

10 *Pullman* abstention is not appropriate in this case. First, Plaintiffs' complaint does
11 not present a federal constitutional question. See (Am. Compl. (#1)). Second, the law of
12 foreclosure is generally settled in Nevada. The new bill Plaintiffs cite to basically increased
13 existing remedies and penalties already available to those whose homes were wrongfully
14 foreclosed on and, therefore, does not create new law or unsettle existing law. See A.B.
15 234. Finally, even if the bill creates a sensitive area of social policy in Nevada, the
16 amended statute is inapplicable to Plaintiffs' claims because it only applies to documents
17 filed after July 1, 2011, see A.B. 284, and the last "Notice of Trustee's Sale" was filed on
18 June 10, 2011. (Am. Compl. (#1) at ¶ 20). Accordingly, this Court declines to abstain and
19 denies the motion for remand.

20 CONCLUSION

21 For the foregoing reasons, IT IS ORDERED that Plaintiffs' Motion to Remand (#7) is
22 DENIED.

23
24 DATED: This 11th day of May, 2012.

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26 
27 United States District Judge
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